# Central Law Journal.

ST. LOUIS, MO., JANUARY 18, 1918.


## RIGHT OF A LABOR UNION TO INDUCE ITS MEMBERS TO COMPEL AN EMPLOYER TO UNIONIZE HIS BUSINESS.

The decision of the Fourth Circuit Court of Appeals dismissing a bill by a mine owner to restrain certain officers of a labor union from persuading laborers to join the Union and thereby bring about a strike at its mine, where such laborers had agreed as a condition of employment that they would not join, was reversed by U. S. Supreme Court, notwithstanding the fact that the contracts between such mine owner and such laborers were terminable at will. There was dissent by Justice Brandeis, concurred in by Justices Holmes and Clark. Hitchman Coal & Coke Co. v. Mitchell, 38 Sup. Ct. 65.

The prevailing opinion by Justice Pitney says the fact that this is a contract terminable at will "does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion." But how may this be pertinent in a suit between the employer and a third person? This was not a case where the employee was complaining.

The court, however, further says: "Plaintiff (the mine owner) was and is entitled to the good will of its employees, precisely as a merchant is entitled to the good will of his customers, although they are under no obligations to deal with him. The value of the relation lies in the reasonable probability that by properly treating its employees and paying them fair wages and avoiding reasonable grounds of complaint, it will be able to retain them in its employ and to fill vacancies occurring from time to time by the employment of other men upon the same terms. The pecuniary value of such seasonable probabilities is incalculably great and is recognized by the law in a variety of relations."

This is quite a novel application of the doctrine of property right in good will, and appears to suggest a difference in businesses long established and those newly begun. But it is not very apparent how a new business might be differentiated as far as employment of labor is concerned as easily it is differentiated with regard to custom. Custom must be proved to be valuable, stable, easily to be estimated. It must present a basis for expectation of continuance. About the only thing any business—and one as well as another—could show was that it was so circumstanced that it would exist in the future for an appreciable time.

Passing on we find this opinion referring to one having a right of action against another for persuading an employee to quit a service he is engaged in and to the fact that these officers were not the agents of employees to bring about any such situation as they were aiming at. It was said: "The right of employees to strike would not give to defendants the right to instigate a strike. The difference is fundamental."

The opinion concedes that the good faith of those officers is to be taken into account, but where the damage threatened is irremediable, and a ruling "as in this case upon an assertion of conflicting rights that are sought to be attained by unfair methods, and for the very purpose of interfering with plaintiff's rights, of which defendants have full notice," it will not be controlling. This does not sound very positive. It does not grip one as a principle.

But the court speaks more emphatically in saying that: "Another fundamental error in defendants' position consists in the assumption that all measures that may be resorted to are lawful if they are "peaceable"—that is, if they stop short of physical violence. In our opinion any violation of plaintiff's legal rights continued by defendants for the purpose of inflicting damage, or having that as its necessary effect, is as plainly inhibited by the law as if it involved a breach of the peace. A combination to procure concerted breaches of contract by plaintiff's employes constitutes such violation."

As a general principle this is true, but if by statute or general policy of law, the right of labor unions to bring about a strike by peaceable means is deemed lawful, why should not all such contracts as are spoken of be deemed to have been made subject to police power as to their validity?

Justice Brandeis, in his dissent, appears to take this view of the matter, taking the position that this is especially true as respects contracts terminable at will. At all events, it seems that legislation giving labor unions the right to organize for their own benefit and incidentally to canvass for members does not include the right to act in a way counter to the legal rights of another. But the decision does not dispose of any specific grant of right to a labor union to accomplish such a result as was being aimed at. Whether such legislation would be valid under the Fourteenth Amendment is another question. Would it be lawful under a state's police power? This power embraces situations far beyond what formerly were not considered within its reach. And then, we repeat, that the doctrine announced as to good will is quite an advance so far as property therein is concerned. There cannot be shown any predicate as understood at common law, to base violation of recognized right. In other words, there is speculation, pure and simple.

## NOTES OF IMPORTANT DECISIONS.

CONSTITUTIONAL LAW—PROVISION AS TO STYLE OF PROCESS BEING MANDATORY ON DIRECTORY.—Section 38 of Article 6 of the Constitution of Missouri provides that :"All writs and process shall run * * * in the name of the State of Missouri," and in an order of publication to a non-resident defendant there was special appearance for her and objection made that the notice of publication not so running conferred no jurisdiction upon the court. This objection was overruled by the Circuit Court and this ruling was affirmed by Missouri Supreme Court, Creason v. Yardley, 198 S. W. 830.

The court affirmed an opinion by its commissioner upon the ground that the notice gave precisely the same information that would have been given had it have run in the name of the State of Missouri. Therefore this constitutional provision must be deemed directory. It was said: "We are of the opinion that, if said order of publication had contained all the alleged requirements pointed out by appellant, it would have afforded no more practical information than that contained in the order of publication as made."

This argumentation seems to us faulty for a variety of reasons, one or two of which may be mentioned.

In the first place it seems quite a long step to say that a positive direction in fundamental law may be deemed directory. This, as we understand, means that it may be observed or disregarded just as one pleases. Here there was no pretense of an attempt at compliance.

In the second place, if the provision should have force in any writ, this ought to be in a case where the writ is not to be personally served. Certainly one being under duty to take notice of whatsoever writ may affect his property in the jurisdiction, is not bound to read a published writ that does not "run" as the state Constitution requires that it should run. Otherwise it does not purport properly to emanate from an officer presumptively authorized to issue it. If an absentee is enjoined by law that his rights may be affected, may he be not excused from reading a writ which a fundamental law requires to be directed in a certain way?

It may be difficult to say what purpose Missouri Constitution had in this positive requirement and we may concede that if a writ not running as required is personally served, ap-

pearance would waive nonobservance of the requirement, but to declare it directory in all cases is equivalent to saying it is of no special importance.

But how lightly a constitution may be set at naught, this case points an instance. Is the word "directory" a word of camouflage, that is to say wholly misapplied when the eye of a court is seeking substance rather than shadow?

---

MUNICIPAL CORPORATIONS — ORDINANCE REGULATING HEIGHT OF BUILDINGS.—In State ex rel. Sale v. Stahlman, 94 S. E. 497, decided by West Virginia Supreme Court of Appeals, peremptory writ of mandamus was granted against the mayor of a city to grant a permit to erect a one-story building.

In answer to application for the writ it was claimed that power was given to the city to "regulate the height, construction and inspection of all new buildings," and that permit had been refused relator to erect a building on his lot to be a one-story structure, when the adjoining lots had on them buildings three stories high. This lot being on one of the city's principal thoroughfares the policy of the city was to this end.

Conceding, as the court does, that in the interest of public safety a city may restrict the height of buildings, it is denied that it may compel a builder to build up to a restricted height. The court said:

"Artistic, civic, and economic views of a one story building between three or four story buildings in a section in which, as a rule, only the higher structures are put up, severely condemn it, but certain obvious laws of physics effectually exclude the assumption that it is substantially conducive to danger from fire. Of course, an open fire between tall buildings may be more dangerous, in the absence of resistance, than a smothered one; but a fire in a one story building would not be an open one. It would be subject to the restraining influence of the roof and walls, in a manner similar to that exerted by the walls, floors, and roof of a higher structure. Besides, a low building is more accessible to firemen than a high one. The combustible matter on which the fire feeds is all near the ground and within easy reach. Water may be poured directly upon it from the windows and roofs of the adjacent and neighboring buildings. Its low altitude decreases the danger to firemen and facilitates their work. There is nothing by which the fire can spread directly upward, the direction in which it runs most rapidly, and the volume of combustible matter is smaller than that of a higher building. Any slight tendency of a one story building situated between higher ones to danger by fire is manifestly outweighed and reduced to nothing by these obvious and commonly known factors and principles."

This ruling proceeds upon the idea that there can be no reasonable classification for the exercise of police power in such a requirement as the city sought to make. It may be, however, that some theory might show that public safety would be advanced by having buildings of uniform height, but it would be difficult to discern them. The burden was on the city to show reasonable classification under police power. The "artistic, civic and economic" theory was well declared not to warrant classification.

---

CONSTITUTIONAL LAW—INQUIRY INTO SHIPMENT OF LIQUOR FOR PERSONAL USE.—In Seaboard A. L. Ry. v. North Carolina, 38 Sup. Ct. 96, it appears that a railroad was convicted for refusing to allow inspection by a private person of record of shipments of intoxicating liquor under a statute requiring such record to be kept with consignees to sign on receipt of shipment, it being provided that said book be open for inspection by any officer or citizen of the state. There was a special verdict showing that a citizen sought inspection of such record, when he was not an officer and acted under no legal process, and was denied the right of inspection. It was also recited that the citizen was seeking general information, having in his mind specially to see who were consignees "for the purpose of prosecuting such as may be charged or suspected with the violation of the prohibition laws of the state." In this verdict the court found the railroad guilty, and this decision was affirmed by the federal Supreme Court.

This statute was passed under authority of the Webb-Kenyon law, and the railroad claimed that compliance with the state statute would necessarily violate § 15 of the Commerce Act which forbade disclosure to other than shippers and consignees anything to the prejudice of the latter to one not acting by virtue of legal process.

The court first alludes to decision upholding the Webb-Kenyon law, declaring its purpose to be to prevent any "subterfuge and indirection" to set state laws regarding liquor shipments at naught. Then it was said: "Plainly, therefore, after that enactment nothing in the laws or Constitution of the United States restricted North Carolina's power to make shipment of intoxicants into Wake County a penal offense, irrespective of any personal right in a consignee there to have and consume liquor of that character. The challenged act, instead of interposing an absolute bar against all such

shipments as it was within the power of the state to do, in effect permitted them upon conditions intended to secure publicity, to the end that public policy might not be set at naught by subterfuge and indirection. The greater power includes the less."

It seems to us that, while police power may, in some circumstances, be a greater power than personal right, yet where the latter is absolute it ought not to be thought to be less than the former, if it is being exercised in a wholly unexceptionable way. There is nothing exceptional in an ordinary shipment whereby a consignee obtains title to goods shipped. It becomes exceptionable, if at all, by some ulterior design aimed, not at him, but at others with whom he has no contractual or other relations. To say that subterfuge practiced by them gives a right against him, or even puts any burden of proof on him, under the claim of useful publicity, is offering a basis for the exertion of police power that is far-reaching."

## THE TWENTY-EIGHT-HOUR LAW AS CONSTRUED IN PENAL ACTIONS.—PART II.*

*Connecting Carriers.*—The courts are divided in their construction of the law as applied to movement of live stock over the lines of connecting carriers. The weight of authority, and as it seems to the writer, of reason also, is that the law penalizes the continuance of the confinement of the animals after they have already been confined the period of time permitted by the statute. The offense is not that the defendant itself confined the stock for a longer period than the authorized time, but that it continued to confine stock which had already been confined (whether by it or preceding carriers) as long as the law permits. Under this view if a carrier accepts from a preceding line a shipment on which the time limit has already expired it violates the law, and if its act is done knowingly and willfully it is liable for the penalty.[35] It is no defense that the preceding line has been fined for its violation since each carrier is separately guilty for having in its possession, without legal excuse, overconfined stock.[36] The other line of authorities proceeds upon the theory that one violation occurs when the time limit expires and the carrier in whose possession the stock were at that time is guilty, and that the time necessarily counted against the first carrier cannot be again counted against the connecting line. Under this view a minimum time of 28 or 36 hours as the case may be, is required for the commission of each offense.[37] Under this rule a carrier which receives a car of stock which has already been over-confined is not liable unless a second time limit expires while the shipment is in its possession. If it can pass the car on to the next carrier before that occurs it escapes altogether.[38] These authorities hold that the imposition of a penalty satisfies the law for the period necessarily counted to make the first violation and therefore such period cannot be counted again against the same or another carrier.

It is established, however, by the great weight of authority that where a connecting line or terminal company accepts a shipment already over-confined from the preceding carrier, for the purpose of carrying it to its pens, convenient to the

*Part I appeared in last week's issue, page 23.

(35) U. S. v. Oregon Short Line (Ida.), 160 Fed. 526; Grand Tr. Ry. Co. of Canada v. U. S. (N. Y.), 191 Fed. 803; U. S. v. N. Y. C. & H. R. R. Co. (N. Y.), 156 Fed. 249.

(36) U. S. v. Wabash R. Co. (Mo.), 182 Fed. 802; U. S. v. N. Y. C. & H. R. R. Co. (N. Y.), (221 Fed. 1000; U. S. v. Nor. Pac. Term. Co. (Ore.), 181 Fed. 879; N. Y. C. & H. R. R. Co. v. U. S. (N. Y.), 203 Fed. 953.

(37) U. S. v. Louisville & N. R. Co. (Tenn.), 18 Fed. 480; U. S. v. Sioux City Stock Yards (Ia.), 162 Fed. 556.

(38) U. S. v. Chicago, M. & St. P. Ry. Co. (Ia.), 234 Fed. 386 (holding defendant must itself have kept stock in confinement more than statutory period); U. S. v. Stockyard Term. Co. (Minn.), 172 Fed. 452 (does not decide whether second period would begin to run when defendant received the shipment, or from expiration of first.

junction, for unloading, feed and water, it does not thereby necessarily render itself liable to the penalty since such action is in aid of the humane purpose of the law. These decisions rest on the ground, not always specifically expressed, that the carrier's act was not done knowingly and willfully. But to avoid liability the carrier must transport the stock to the pens and unload them without unreasonable delay.[39] Where the time consumed substantially exceeds the usual running time to the pens the burden is on the carrier to show due diligence to unload promptly. Thus where the usual running time was 1 hour and 5 minutes it was held that the defendant did not sufficiently excuse itself for taking two hours and a half to unload the stock, by merely showing that the temperature was very cold and that the route lay through a busy part of the railroad yards.[40] The defendant must show *facts* from which the court can find that the time used was not unreasonable. The testimony of two conductors that the movement was reasonably prompt is not sufficient to satisfactorily explain why three hours and thirty-five minutes should be necessary to carry a car of stock seven miles and unload them; such movement is prima facie too slow.[41] In another case where the running time to the pens was about one hour, but the carrier failed to unload the stock for four hours and forty minutes, the court held that the burden was on the carrier to show that the delay was caused by storm, accident or other excepted cause.[42] It makes no difference that defendant is a link in the through route and carried the shipment in the direction of its destination.[43]

A few courts do not admit the soundness of the argument that a carrier may excuse itself for continuing the overconfinement on the ground that it does so solely for the purpose of unloading the stock as promptly as possible. They hold that the connecting line is under no obligation to accept a shipment on which the limit has expired, and take the view that the enforcement of the law will be better subserved if connecting lines refuse to receive shipments in such cases.[44] It is immaterial under this view that the defendant unloaded the animals as promptly as possible.

A carrier which delivers the shipment to the next line within the time limit is not guilty[45] unless such connecting line is a mere agency of the first line and not an independent carrier.[46]

The question of the connecting line's knowledge that the stock had been already overconfined when received by it will be considered when we come to the discussion of the words "knowingly and willfully" in the statute.

*Storm or Other Accidental Causes, Etc.* —The carrier does not violate the law by confining the stock beyond the statutory period where it is prevented from unloading them "by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight." Defense under this exception must be pleaded and proved by the defendant. The Government need not allege in the complaint that the overconfinement was not caused by storm or

(39) U. S. v. Lehigh Val. R. Co. (N. Y.), 184 Fed. 971; Nor Pac. Term. Co. v. U. S. (Ore.), 184 Fed. 602 (1300 feet to pens); U. S. v. Stockyards Term. Co. (Minn.), 178 Fed. 19 (11 miles to pens.).

(40) U. S. v. Delaware L. & W. R. Co. (N. Y.), 220 Fed. 944.

(41) N. Y. C. & H. R. R. Co. v. U. S. (N. Y.), 203 Fed. 953.

(42) U. S. v. Delaware, L. & W. R. Co. (N. Y.), 206 Fed. 513.

(43) St. Louis Merchants' Bridge & Trans. Co. v. U. S. (Ill.), 209 Fed. 60. (Eastbound shipments received in St. Louis and carried to pens in East St. Louis, Ill.)

(44) U. S. v. Nor. Pac. Term. Co. (Ore.), 186 Fed. 947; U. S. v. St. Joseph Stockyards Co. (Mo.), 181 Fed. 625.

(45) U. S. v. Sou. Pac. Co. (Cal.), 157 Fed. 459.

(46) U. S. v. Union Pac. R. Co. (Utah), 213 Fed. 332, 181 Fed. 625.

accident.[47] It is held that an accident such as will excuse the carrier under this provision is "one which cannot be avoided by that degree of prudence, foresight, care, and caution which the law requires of everyone under the circumstances of the particular case; that is, such care and caution as would have been exercised by a man of ordinary prudence in the circumstances of the particular case; it does not include an accident caused by the negligence of the carrier, nor press of business, nor the side tracking of the train to allow passenger and fast freight trains to pass if such meetings were known or anticipated when the movement began."[48] The carrier must show that the breakdown or wreck relied on as an excuse did not result from a cause that due diligence and foresight would have anticipated and avoided.[49] It must be a cause "which reasonably prudent and cautious men under like circumstances do not and would not ordinarily anticipate and whose effects under similar circumstances they do not and would not ordinarily avoid."[50] Let us see the application made of these principles by the courts to the facts of particular cases. In the case last cited a train of sheep was inspected before leaving a feeding station and nothing found wrong. It had enough time to reach the next feeding station within the time limit and before dark. Delay occurred, however, due to an unusual series of accidents; first on account of the breaking of a drawbar on another train on the road. A chain was substituted in place of the drawbar but this also broke. Further delays were caused by the breaking of a coupler and two drawbars on the sheep train, with the result that the train did not reach the unloading station until after dark, but within the time limit. The sheep were dragged out of two cars in the dark before the time limit expired. The men then became exhausted and allowed the rest of the sheep to stay in the cars all night. The carrier was held not guilty.

A car of stock reached a point sixteen miles from destination with four hours' margin. A drawbar pulled out necessitating the calling of a wrecking train. Later an air hose burst, these two accidents causing a delay of three hours and twenty minutes. The car was not unloaded until two hours and seventeen minutes after the time limit had expired.

In other words the carrier consumed nearly three hours, after deducting the accidental delays, in carrying the stock sixteen miles and unloading them. The court held that this was sufficient evidence to sustain a verdict of guilty since the jury may have found that the defendant did not use due diligence after the delays occurred. There was also room for the jury to find that a delay of about an hour and a half in calling for the wrecking train was negligent.[51]

In a recent case the court seems to draw a distinction between accidents, such as wrecks, which are practically (though not strictly) *vis major*, and congestion of traffic, holding the former to be covered by the exception, but not the latter.[52]

In another case the court left open the question whether a great and unusual press of business may not under some circumstances excuse the carrier, but held that a mere allegation in the answer that the overconfinement was due to such cause, unexplained and of itself, does not state a good defense.[53]

(47) U. S. v. Oregon Short Line (Ida.), 160 Fed. 526; N. Y. C. & H. R. R. Co. v. U. S. (Mass.), 165 Fed. 833.

(48) U. S. v. Sou. Pac. Co. (Cal.), 157 Fed. 459.

(49) U. S. v. Atchison, T. & S. F. Ry. Co. 194 Fed. 342.

(50) Chicago, B. & Q. R. Co. v. U. S. (Neb.), (Ill.), 166 Fed. 160.

(51) Chicago & N. W. Ry. Co. v. U. S. (Ill.), 234 Fed. 268.

(52) U. S. v. Phila. & R. Ry. Co. (Pa.), 238 Fed. 428.

(53) U. S. v. Union Pac. R. Co. (Wyo.), 169 Fed. 65.

Under the old law, which excused the carrier where the unloading was prevented "by storm or other accidental cause" it was held that "other accidental cause" meant other unavoidable cause like a storm, and did not embrace accidents resulting from carrier's negligence.[54]

There are cases where weather conditions interfered with the unloading of the stock, but these cases will be discussed under the caption "knowingly and willfully," as they seem properly to belong under that head.[55]

*Knowingly and Willfully.*—While every confinement of stock in cars beyond the twenty-eight or thirty-six hour period, as the case may be, is, in the absence of legal excuse, a violation of the law, it does not follow that the carrier is always liable for the penalty. The penalty is imposed only where the carrier knowingly and willfully fails to comply with the law. There is much confusion in the cases as to just what these words mean. A minority of the courts hold that if a carrier fails to comply with the law with full knowledge of the facts its action is willful.[56] These courts say that willfully only means without lawful excuse, or the intentional doing of the act forbidden.[57] The trouble with this view is that it practically deprives "willful" of any meaning in the law at all. Its effect is to hold a carrier guilty for receiving a shipment on which the time period has elapsed, for the purpose of unloading the animals, even where its refusal to receive them would greatly delay their release from the cars. We have seen that the majority of the decisions hold the carrier not liable in such a case provided it handles the shipment promptly.

The following language taken from the opinion in St. Louis & S. F. Ry. Co. v. U. S.,[58] expresses the prevailing view and has been much cited:

"'Knowingly' evidently means with a knowledge of the facts which taken together constitute the failure to comply with the statute, as in the case where one carrier received a car loaded with cattle, and, with knowledge of how long they had been confined in the car without rest, water, or food, prolongs the confinement until the statutory limit is exceeded."

And the same court declares that "willfully" "means purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements."[59] It does not mean with evil intent or a bad and malignant heart on the part of the defendant, or with intent to injure the stock.[60]

Thus the carrier's failure to unload before expiration of the time limit may be done knowingly but not willfully, and, therefore, without incurring liability for penalty, as where defendant, which had provided itself with sufficient suitable pens for the reasonable accommodation of its traffic, was compelled on account of unexpected delays to unload a shipment into pens at an intermediate station which were not properly equipped. The court did not decide whether unloading into improper pens was a violation of the law, but held, granting that it was, that the defendant's action was not willful under the circumstances.[61]

(54) Newport News & M. V. Co. v. U. S. (Ky.), 61 Fed. 488.

(55) U. S. v. Phila. & R. Ry. Co. (Pa.), 223 Fed. 207; U. S. v. Phila. & R. Ry. Co. (Pa), 223 Fed. 211.

(56) U. S. v. Phila. & R. Ry. Co. (Pa.), 238 Fed. 428.

(57) Newport News & M. V. Co. v. U. S. (Ky.), 61 Fed. 488; U. S. v. Sou. Pac. Co. (Cal.), 157 Fed. 459; U. S. v. Union Pac. R. Co. (Wyo.), 169 Fed. 65.

(58) (Mo.), 169 Fed. 69.

(59) Chicago, B. & Q. R. Co. v. U. S. (Neb.), 194 Fed. 342; U. S. v. Stockyards Term. Co. (Minn.), 178 Fed. 19; St. Louis, M. B. & T. R. Co. v. U. S. (Ill.), 209 Fed. 60; N. Y. C. & H. R. R. Co. v. U. S. (Mass.), 165 Fed. 833.

(60) U. S. v. Atchison, T. & S. F. Ry. Co. (Ill.), 166 Fed. 160; Chicago & N. W. Ry. Co. v. U. S. (Ill.), 234 Fed. 272.

(61) St. Louis & S. F. Ry. Co. v. U. S. (Mo.), 169 Fed. 69.

But where the stock are carried in patent cars designed to dispense with unloading under the statute, it has been held that if the carrier knowingly and willfully confines the stock more than twenty-eight hours without their being fed it is guilty even though it appeared that there was a caretaker in charge, who had undertaken to feed the stock and had provisions in the car.[62] In such case it seems the carrier must see to it at its peril that the stock actually are properly fed and watered.

"Knowingly and willfully" is not synonymous with "negligently." In one case the court says:[63]

"It is not possible to omit an act knowingly and willfully, unless the act be consciously in the mind; if it be no longer in the mind it cannot be within the range of either knowledge or intention."

For example, if an employee had learned from the waybill how long the stock had been confined, but his attention being diverted, had forgotten to unload them within the time limit, his omission would not be willful.[63] So where the failure to unload in time was due to a clerical error of one of defendant's employees which others negligently failed to discover, it was not a knowing and willful failure to observe the law.[64] It has been held, however, that an answer alleging that the failure to unload the stock in due time was caused solely by the oversight, forgetfulness, and unintentional neglect of defendant's train dispatcher in not notifying the station agent of the movement of the car, did not state a good defense, since the knowledge of defendant's employees is imputable to it;[65] and where an employee in violation of the rules of the company which employees were required to read and strictly observe, negligently failed to note a waybill and direct unloading of the car, it was held that the carrier was liable.[66]

There is no uniformity among the court decisions as to the effect of a connecting carrier's ignorance of how long the stock had been confined when received by it. Some hold it must find out at its peril;[67] others that it is presumed to know how long they have been confined and to excuse itself on the ground of ignorance of the facts, it must show that it could not ascertain the facts by reasonable inquiry.[68] This is believed to be the sounder view; a third group seem to hold that if actual knowledge of the overconfinement is lacking the defendant cannot be liable even though it failed to make any inquiry.[69] The decisions where this view is expressed are cases where terminal carriers accepted stock on which the limit had expired, or was about to expire, for the purpose of switching to the pens for unloading, and did so promptly, and it is believed that the cases can be distinguished on the ground that the carrier would not have been required to refuse to handle the stock under the circumstances, if it had known how long they had been overconfined.

The views of the courts as to what acts constitute a knowing and willful violation are illustrated by the following digest of cases:

A terminal company which received a shipment on which the limit had expired for switching to the stockyards on its line for unloading was held guilty, although it handled the car as promptly as possible and did not know that the limit had been ex-

(62) Chicago, B. & Q. R. Co. v. U. S. (Neb.), 195 Fed. 241.

(63) U. S. v. Lehigh Val. R. Co. (N. J.), 204 Fed. 705.

(64) U. S. v. Phila. & R. Ry. Co. (Pa.) 223 Fed. 213.

(65) Montana Cent. Ry. Co. v. U. S. (Mont.), 164 Fed. 400.

(66) U. S. v. Atlantic C. L. R. R. Co. (Va.), 163 Fed. 764.

(67) U. S. v. St. Joseph Stockyards Co. (Mo.), 181 Fed. 625; U. S. v. Sioux City Trans. Co. (Ia.), 234 Fed. 663.

(68) N. Y. C. & H. R. R. Co. v. U. S. (N. Y.), 203 Fed. 953.

(69) U. S. v. Chicago Jct. Ry. Co. (Ill.), 211 Fed. 724; St. Joseph Stockyards Co. v. U. S. (Mo.), 187 Fed. 104.

ceeded. The court said it was obliged to find out how long the stock had been confined at its peril.[70]

Where defendant received a car of hogs from the preceding carrier two and a half hours before the time limit had expired, and two hours was a reasonable time within which it should have unloaded them, but failed to unload them until the time limit had been exceeded by more than an hour and a half, it was held guilty. It was no defense that the waybill was so indistinct that defendant's employees failed to discover the time of last loading noted thereon, nor that it was misled by the preceding carrier's having advised it by telephone that sixteen cars of sheep were coming on which the time limit was about to expire and had failed to mention the hogs which were moving in the same train.[71]

It has been held not to be a willful violation of the law for a connecting carrier to receive stock already confined beyond the limit, where the run destination is only seven miles, and the stock would otherwise have to be carried fifteen or twenty miles for unloading.[72]

A shipment of livestock was delivered to defendant terminal company on which the time limit had expired. Defendant did not know how long the stock had been confined on account of the waybill not having been received until later. It switched the cars to its pens and unloaded them with reasonable despatch, but not with the usual speed due to an unusual number of cars being received at once. The court held that it was not guilty of knowingly and willfully violating the law, and pointed out that it would not have helped any for defendant to have inquired how long the stock had been confined since its pens were in any event the most convenient into which they could have been unloaded.[73]

Defendant, a switching line and stockyards company, received four cars of stock from a connection. Three of the loads had already been in the cars overtime and the limit was nearly up on the fourth. Defendant did not know how long the shipments had been confined and made no inquiry. It hauled the cars to its pens and unloaded them with due diligence and promptness, consuming two and a half hours in the operation. Held, this was not a knowing and willful violation of the law. The defendant had the right to assume that the preceding line had not violated the law.[74]

Defendant, a switching line, received several carloads of horses for switching to the yards for unloading after the limit had expired. It did not have access to the billing nor did it have actual knowledge how long the horses had been confined. It promptly unloaded all the cars except one, which, on account of an erroneous order having been given defendant, was first carried to the wrong unloading chute where the horses could not be unloaded without halters. This mistake necessitated the movement of the car to another pen and caused further delay. Held that the carrier was not guilty as to any of the cars, as its action under the circumstances did not constitute a knowing and willful failure to comply with the law.[75]

Where defendant's agent first refused to accept a shipment of stock from a connecting line, knowing that defendant could not unload it within the time limit, but five and a half hours later, upon a second tender did receive it, thinking the animals had been unloaded and fed in the meantime, it was held that defendant was not guilty

(70) U. S. v. St. Joseph Stockyards Co. (Mo.), 181 Fed. 625.

(71) U. S. v. Sioux City Term. Co. (Ia.), 234 Fed. 663.

(72) N. Y. C. & H. R. R. Co. (N. Y.), 203 Fed. 953.

(73) U. S. v. Sioux City Stock Yds. (Ia.), 162 Fed. 556.

(74) St. Joseph Stockyards Co. v. U. S. 187 Fed. 104.

(75) U. S. v. Chicago Jct. Ry. Co. (Ill.), 211 Fed. 724.

if its agent was deceived or mislead by the connecting line and on that account unavoidably confined the stock too long. In view of the narrow margin of time available in which the stock could have been unloaded and given five hours' rest it was held to be a case for the jury, the test being whether defendant's agent exercised reasonable care in the premises.[76]

Where a train load of sheep was delayed in reaching an unloading station until after dark on account of a series of unusual accidents to it and other trains, and the men dragged the sheep out of two cars in the dark before the thirty-six hour limit expired, and then, becoming exhausted, left the rest in the cars until morning, it was held that the carrier was not liable for the penalty, the failure to unload not being knowing and willful.[77]

Defendant, initial carrier, delivered a shipment to the second carrier nine hours before the expiration of the time limit. The second carrier first received the car but an hour later it telephoned defendant it could not accept it, because it barely had time to get the stock to the third carrier without exceeding the limit and knew that the third carrier would refuse to receive them. Defendant notified the second carrier that it refused to receive the car back. Nevertheless the second carrier placed the car on the defendant's track before the limit had expired. Defendant had no actual knowledge at the time that the car had been returned to it, and as this was done at ten-thirty P. M., and defendant did not perform switching service at night, the car remained where placed all night and the time limit was exceeded. Next morning defendant switched the car to pens and unloaded it. Held such facts did not constitute a case of knowingly and willfully failing to obey the law.[78]

(76) Oregon-Wash. R. & N. Co. v. U. S. (Ida.), 205 Fed. 342.

(77) Chicago, B. & Q. R. Co. v. U. S. (Neb.), 194 Fed. 342.

(78) U. S. v. Chicago, R. I. & P. R. Co. (Ill.), 211 Fed. 770.

The car arrived and was placed in a suitable place for unloading. The caretaker told the trainmen that he would notify the consignee, who would unload the stock. The carrier's agents, relying on the caretaker's assurances, took no steps to have the stock unloaded. The consignee failed to unload them until after the lawful period had expired and the carrier was prosecuted. The court held that it was for the jury to say whether the failure to unload under such circumstances was willful or due to accidental or unavoidable causes.[79]

The defendant placed a carload of hogs at a pen used solely by the consignee before the expiration of the time limit but after consignee's place of business had closed for the night, and notified consignee to unload. Consignee failed to do so, however, until after the limit had been exceeded. It appeared that the pens were uncovered and about a fourth of a mile from consignee's yards; that it was impracticable to drive the hogs from the pen to the yards in the night; that a blizzard was raging, so that good judgment dictated holding the hogs in the car rather than unloading them into the uncovered pen. The defendant was held not guilty. This was a case where defendant's act was knowingly but not willfully done. Nor was the carrier liable under the circumstances for having failed to provide covered pens.[80] So under a similar state of facts except that consignee refused to unload on account of a storm, where it appeared that there were no suitable pens within available distance in which the stock could have been unloaded by the carrier, it was held that the carrier was not guilty.[81]

The complaint of the Government must allege that the defendant knowingly and willfully failed to comply with the re-

(79) Oregon-Wash. R. & N. Co. v. U. S., 205 Fed. 337.

(80) U. S. v. Phila. & R. Ry. Co. (Pa.), 223 Fed. 207.

(81) U. S. v. Phila. & R. Ry. Co. (Pa.), 223 Fed. 211.

quirements, but it need not allege that the failure was not caused by storm or other excepted cause.[82] The knowing and willful character of the failure must be shown by a preponderance of evidence.[83] This does not mean, however that the Government must introduce evidence of a direct intent to do injury to the stock. Where complaint alleged that defendant knowingly and willfully confined the stock overtime and the answer denied this, and a stipulation of counsel admitted only that they were confined overtime, the court should neither instruct the jury to find for the defendant, nor direct a verdict against it, but should leave the issue of whether the act was knowingly and willfully done to the jury.[84]

*Unit of Offense.*—Until the matter was decided by the Supreme Court there was no little confusion among the lower courts as to what the unit of offense was under the law. It was early decided that there could not be a separate penalty imposed for each animal in respect to which the law was violated.[85] The view held by nearly all of the lower courts was that the shipment is the unit of offense, whether it be a shipment of a single animal, a carload, or several carloads.[86] The carriers sometimes contended that the train was the unit.[87]

The law is now settled by the decision of the Supreme Court in Baltimore & Ohio S. W. R. Co. v. U. S.[88] This case holds that neither the number of animals, nor their ownership, nor the number of shipments, has anything to do with the unit of offense. The test is the number of twenty-eight (or in case of shipper's release, thirty-six) hour periods which expire. For example, if the time limit of several cars handled on the same train will expire at the same time, upon the expiration of the limit only one offense is committed regardless of how many cars or shipments were affected, or of the ownership of the stock, or whether they were consigned to the same or different destinations. So where one car was shipped with thirty-six-hour release and eight hours later another car not released was loaded at another station and handled on the same train, only one offense was committed as to these two cars, since the time limits on them expired contemporaneously. The loading of a number of cars of stock belonging to different owners and destined to different points may be treated as a single act if not discontinuous or unduly prolonged and if the cars are carried in the same train the limit will be deemed to expire at the same time and place as to all, and the over confinement of all the stock will be but a single offense.[89] It has even been held that where a carload of cattle loaded at one station is handled on the same train with a car loaded a few minutes earlier at another station they may be treated as a unit. The court said:

"There was practically but one offense, and the slight difference in time when the lawful period expired is insignificant, and

(82) U. S. v. Oregon Short Line (Ida.), 160 Fed. 526.

(83) U. S. v. Lehigh Val. R. Co. (N. J.), 204 Fed. 705; St. Joseph Stockyards Co. v. U. S. (Mo.), 187 Fed. 104.

(84) Chicago & N. W. Ry. Co. v. U. S. (Ill.), 234 Fed. 272.

(85)), U. S. v. Boston & A. R. Co. (Mass.), 15 Fed. 209 (arose under old law).

(86) U. S. v. Sou. Pac. Co. (Cal.), 157 Fed. 459; U. S. v. B. & O. S. W. R. Co. (O.), 159 Fed. 33 (train load theory rejected); N. Y. C. & H. R. R. Co. v. U. S. (Mass.), 165 Fed. 833; U. S. v. Oregon, R. & N. Co. (Ore.), 163 Fed. 642; Sou. Pac. Co. v. U. S. (Cal.), 171 Fed. 360.

(87) See U. S. v. St. Louis & S. F. Ry. Co. (Mo.), 107 Fed. 870. (Ten cars of cattle shipped at same time by same consignor to same consignee moved in the same train. Court held that only one offense was committed, and seemed to take the view that the train was a unit. It does not appear whether all ten cars were covered by one bill of lading or by ten. If they all constituted but a single shipment, the case is not inconsistent with the shipment-unit theory.)

(88) 220 U. S. 94.

(89) U. S. v. Nor. Pac. Term. Co. (Ore.), 186 Fed 947. See also B. & O. S. W. R. Co. case, supra.

therefore, giving the statute a reasonable construction, may be disregarded."[90]

*Nature of Action.*—The remedy for violation of the act is an action by the Government for the penalty. Such action is civil in its nature and subject to all the incidents of a civil suit.[91] Hence the government need only prove its case by a preponderance of evidence,[92] and in case of an adverse decision may appeal.[93] Violation of the Act is not a crime.[94]

*Amount of Penalty.*—The minimum penalty is one hundred dollars and the maximum five hundred. Within these limits it is the court's province to fix the amount after verdict in accordance with the heinousness of the offense.[95] In fixing the amount the court may properly consider the fact that the defendant had or had not instructed its employees to strictly obey the law,[96] or in an action against a connecting carrier for receiving a shipment confined overtime, that the first carrier had already been fined.[97]

JOHN PURYEAR.

Washington, D. C.

(90) U. S. v. N. Y. C. & H. R. R. Co. (N. Y.), 191 Fed. 938.

(91) U. S. v. Atlantic C. L. R. Co. (Va.), 173 Fed. 764.

(92) U. S. v. Sou. Pac. Co. (Cal), 157 Fed. 459; U. S. v. Sou. Pac. Co. (Cal.), 162 Fed. 412; Atchison, T. & S. F. Ry. Co. v. U. S. (Kan.), 178 Fed. 12; Missouri, K. & T. Ry. Co. v. U. S. (Kan.), 178 Fed. 15. Contra: U. S. v. Louisville & N. R. Co. (Ky.), 157 Fed. 979 (criminal in nature and Government must prove its case beyond reasonable doubt).

(93) Baltimore & Ohio S. W. R. Co. v. U. S. 220 U. S. 94. U. S. v. Baltimore & Ohio S. W. R. Co. (O.), 159 Fed. 33.

(94) Montana C. R. Co. v. U. S. (Mont.), 164 Fed. 400.

(95) U. S. v. Sou. Pac. Co. (Cal.), 162 Fed. 412; Missouri, K. & T. Ry. Co. (Kan.), 178 Fed. 15; Atchison, T. & S. F. Ry. Co. v. U. S. (Kan.), 178 Fed. 12; Missouri, K. & T. Ry. Co. v. U. S. (Kan.), 178 Fed. 15; U. S. v. Boston & A. R. Co. (Mass.), 15 Fed. 209.

(96) U. S. v. Delaware, L. & W. R. Co. (N. Y.), 220 Fed. 944.

(97) U. S. v. Nor. Pac. Term. Co. (Ore.), 186 Fed. 947.

## EVIDENCE—ATTEMPT TO SUPPRESS.

### STATE v. LITTLE.

Supreme Court of North Carolina.
Nov. 21, 1917.

94 S. E. 97.

Evidence of an assault by defendant upon the prosecuting witness during the term of court was competent as showing an effort to suppress evidence or to intimidate a witness.

Allen, J. A juror was called and stated upon his examination that he would not convict anyone on the testimony of W. E. Reynolds, the witness upon whom the state had to rely for a conviction, and the court, in the exercise of its discretion, excused him from service on the jury, and the defendant excepted. This ruling is clearly correct. State v. Vann, 162 N. C. 538, 77 S. E. 295. But if erroneous it was not prejudicial, as it does not appear that any juror was challenged, or that the jury which served was not one entirely satisfactory to the defendant. State v. Cunningham, 72 N. C. 469.

The state was permitted to prove, over the objection of the defendant, that the defendant made a violent assault on the prosecuting witness, Reynolds, during the term of court, and this was referred to in the charge to which defendant excepted. This evidence was competent on the question of the guilt of the defendant as a circumstance tending to show an effort to suppress evidence or to intimidate a witness against him.

The evidence of Baldwin as to a conversation with the witness Reynolds was properly admitted as corroborative, and to this his honor confined it.

The fifth, sixth and seventh exceptions are taken to the solicitor's manner of questioning the defendant on cross-examination, the objectionable remarks being as follows:

"Now, tell me the truth about this, if you know how." "Now, Mr. Little, I want you to answer this question; you have been dodging me." "Come on, and tell me what trouble you had."

The remarks preceded the various questions the solicitor asked the witness, and while they may not have been altogether polite, and are in the nature of comments which ought to have been reserved for argument before the jury, they do not exceed the bounds of legitimate discussion, and cannot be held reversible error.

After verdict the defendant moved for a new trial because a member of the petit jury was a member of the grand jury, which passed on

the bill of indictment against him, which was denied. This motion was addressed to the discretion of the judge and his decision thereon is not reviewable.

"It has always been held by us that a motion to set aside the verdict because of a defect as to one of the jurors comes too late after verdict, and addresses itself only to the discretion of the court. Walker, J., in State v. Lipscomb, 134 N. C. 697 (47 S. E. 44). In that case it was shown that the juror was under 21 years of age. In State v. Maultsby, 130 N. C. 664 (41 S. E. 97), the same ruling was made where a relationship was discovered after verdict between the prosecuting witness and a juror, and the court there cited many other cases where a disqualification of a juror on diverse grounds had been found after verdict, and in all which cases the court held that the matter rested in the discretion of the trial judge, and that the refusal of the motion was not reviewable on appeal." State v. Drakeford, 162 N. C. 671, 78 S. E. 309.

The defendant also moved to set aside the verdict, because, on the day before the trial of the defendant, his honor said to five jurors who had stood for the acquittal of one Hinson, charged with retailing, that "they hindered the machinery of justice in holding out against the verdict of guilty, but that if the position they took was taken by reason of their conscientious judgment in the matter, that he had respect for them and that they were entitled to their judgment, and further suggested to the five men who stood for acquittal, that if there were any reasons arising out of prejudice or opposition to the law, why they should not return a verdict of guilty in a retailing case, that the court would relieve them of further duty from that date, but that if it was a mere question of judgment that they could return, that the matter was left with them."

No relation is shown between the two cases, none of the evidence in the Hinson case is set out, nor are the circumstances shown which caused the remarks to be made, and we cannot see that they were not entirely justified.

In any event, the defendant knew all the facts before the trial began, and he could not wait until after verdict, and then bring the matter to the attention of the court for the first time, except by an appeal to its discretion, which is not reviewable.

We have considered all of the exceptions and find no error.

No error.

NOTE.—*Suppression of Evidence in Criminal Case Creating Presumption Against Defendant.* —In a very noted case in American jurisprudence, that of Com. v. Webster, 5 Cush. (Mass.) 295, one of our greatest judges, Shaw, C. J., said in his charge to the jury that: "All attempts on the part of the accused to suppress evidence, to suggest false and deceptive explanations and to cast suspicion, without just cause, on other persons, all or any of which tend to prove consciousness of guilt, and, when proved to exert an influence against the accused "are admissible in evidence." The court, however, added the caution that: "This consideration is not to be pressed too urgently; because an innocent man, when placed by circumstances in a condition of suspicion and danger, may resort to deception in the hope of avoiding the force of such proofs."

As a North Dakota case (State v. Rozum, 8 N. D. 548, 80 N. W. 477) states the matter, in a case where a proposed witness was threatened with violence, and it was evident that he was being intimidated, this "raises a presumption that such evidence is detrimental to the party seeking to destroy or withhold it." How strong the presumption it is not said. It is not meant to say, that there arises any presumption of the truth of the evidence.

In Snell v. Bray, 56 Wis. 156, 14 N. W. 14, the court adopted as a statutory rule, in a case where a letter warning another against testifying in an expected law suit, that laid down by Cockburn, C. J., in Moriarity v. Ry. Co., 5 L. R. Q. B. 314. There the Chief Justice said: "The conduct of a party to a cause may be of the highest importance in determining whether the cause of action in which he is plaintiff, or the ground of the defense, if he is defendant, is honest and just, just as it is evidence against a prisoner that he has said one thing at one time and another at another, as showing that recourse to falsehood leads fairly to an inference of guilt. Anything from which such an inference can be drawn is cogent and important evidence with a view to the issue. So if you can show that a plaintiff has been suborning false testimony and has endeavored to have recourse to perjury, it is strong evidence that he knew perfectly well that his cause was an unrighteous one. I do not say it is conclusive. I fully agree that it should be put to the jury with the intimation that it does not always follow, because a man, not sure he shall be able to succeed by righteous means, has recourse to means of a different character, that that which he desires, namely the gaining of the victory, is not his due, or that he has not good ground for believing that justice entitles him to it. It does not necessarily follow that he has not a good cause of action any more than has a prisoner making a false statement to aid his appearance, if innocence is necessarily a proof of guilt, but it is always evidence which ought to be submitted to the consideration of the tribunal which has to judge of the facts."

In Levison v. State, 54 Ala. 519, defendant was shown by an accomplice to have visited her on the night of his arrest, but when he knew he would be arrested. While she was lying in bed defendant whispered to her and was heard to tell her to "lie still and keep your damned mouth shut."

The court said it was natural that: "The subject of the conversation would be the anticipated arrest, and entreaty, persuasion, threats or commands would be employed to keep her from purposely or by inadvertence disclosing their mutual guilt," if he was guilty. "Considering the

circumstances, we cannot say this evidence had not a relevancy to the main and material fact."

In People v. Chin Hane, 108 Cal. 597, 41 Pac. 697, one on trial for murder, it was shown over objection of defendants, that they each told a witness called to identify them, that they would kill him, if he testified. The court said: "Threats made by a defendant against a witness whom he expects to testify against him, with the evident purpose of intimidating the witness, are proper evidence."

In Kessier v. State, 154 Ind. 242, 56 N. E. 232, the state was permitted to show, that after defendant had made an ineffectual effort to induce a witness to enter his employment, said to him: "If you give us any trouble, and send me over the road, or so I will go there, I have brothers that will watch you all your life." The court cited numerous cases to the effect that attempts to bribe, or intimidate witnesses may properly be considered in determining the guilt or innocence of a person charged with crime; but they are not conclusive. Such conduct is regarded as in the nature of an admission that the party has a bad case, which cannot be supported by honest proof."

After all, such evidence is but a fact of more or less weight according to the circumstances of the acts complained of being committed. It would seem to require some independent evidence, which it is intended to support.

C.

## ITEMS OF PROFESSIONAL INTEREST.

### RECENT DECISIONS BY THE NEW YORK COUNTY LAWYERS ASSOCIATION COMMITTEE ON PROFESSIONAL ETHICS.

QUESTION No. 139.

***Employment; Relation to Other; Attorneys; Relation to Client; Civic Duties—Duties of lawyer, who has declined employment to appear at public hearing ostensibly as a citizen and taxpayer but in fact as hired advocate. Shall he make public disclosure of attempt to employ him, and of his other relevant knowledge?***—A, an attorney, is approached by the attorneys for a public service corporation, with whom he has no previous acquaintance, and is asked to appear at a public hearing as a citizen and taxpayer to object to action to which the corporation is opposed; the attorneys offer to pay him a fee for doing so. A declines the employment. The attorneys, in the course of the conversation, inform A that his name has been suggested by X, an attorney and a man of prominence and influence, as one who may be available for the purpose; after A declines, they mention the names of some others who had been suggested for this employment and ask A's views as to their availability; they particularly inquire about Y, another attorney of prominence in local politics. A takes no part in the matter referred to. He subsequently learns that at the hearing Y appeared as a citizen and taxpayer in opposition to the action referred to. The subject matter of the hearing is involved in a subject which is about to come up for important public action. Knowledge on the part of the public of the foregoing facts and particularly of the relations of X and Y and of the corporation and its attorneys to the transaction might materially influence the attitude of the public on the question. Whether that influence would tend toward a desirable or an undesirable result is not at present clear to A, partly because persons on both sides of the controversy are likely to be affected by the disclosure.

The questions on which the Committee's opinion is asked are:

(1) Would A have been justified in accepting the employment offered?

(2) What is A's duty with respect to making public disclosure of the facts stated above and more particularly:

(a) Is he under a duty to the corporation and its attorneys not to disclose them?

(b) Is he under a duty to the public to disclose them?

(c) Is he justified in entering into a public discussion on the merits of the question in which he will express his own personal views without disclosing the foregoing facts?

(d) Is he justified in using his own judgment and in disclosing or not disclosing the foregoing facts, according, as in his own opinion, their disclosure will tend to action in the public interest or the reverse?

ANSWER No. 139.

In the opinion of the Committee:

(1) It would have been improper for the attorney to masquerade as suggested. (See Canon 26 of the American Bar Association.)

(2) (a) No. The employment offered was not of proper professional nature and therefore imposed no confidential relation.

(b) No; but he may use his discretion.

(c) Yes.

(d) Yes.

QUESTION No. 140

*Employment — Accepting employment as counsel for, and having financial interests in, corporation organized for investigating over-*

*charges by public-service corporations, advising shippers, etc., thereof, and obtaining redress therefor; disapproved.*—Would it be ethical and proper for a lawyer to have financial interest in, and be retained as counsel for, a company organized for the special purpose of making investigations of rates and charges of public-service corporations, advising such latter corporations' patrons of overcharges, and taking same up for adjustment, or litigating same, through its counsel aforementioned, before the appropriate commission or other regulating body?

ANSWER No. 140.

This Committee does not pass upon the question whether or not the Company is practicing law in violation of the statutes of this state. That question is peculiarly within the province of another committee of this association. But the arrangement described in the inquiry appears to the Committee to constitute a device for systematically obtaining business for a lawyer, and for stirring up litigation for profit. For that reason, in the opinion of the Committee, the lawyer's participation therein is improper.

## BOOK REVIEW.

### BLACK ON INCOME AND OTHER FEDERAL TAXES.

This work is by Mr. Henry Campbell Black, of Washington, D. C., author of treatises on Income Taxes, Bankruptcy, Rescission of Contracts, Constitutional Law, etc. It contains the War Revenue Act of Oct. 3, 1917, and follows up his work on Income Taxes, both because of the enactment of that Act. The scope of this work is wider than the prior work. It treats of internal revenue taxes, estate tax, excess profits tax, etc., etc., and reference is made not only to judicial rulings, but to rulings and regulations of departments.

It is intended that the work not only shall be valuable to the profession, but also to business men and investors.

The work is logical in arrangement and style of the writer, is bound in law buckram, of typographical excellence, and issues from Vernon Law Book Company, Kansas City, Mo., 1917.

## HUMOR OF THE LAW.

The big, flat-footed, hungry negro was up for theft.

"I caught him nippin' a fresh-made pumpkin pie from the MacCregor house on Marguerite street," explained Officer Carey.

"Did you?" demanded the judge.

"Dat's a rough word, yo' Honah—sayin' I done stole hit. Now as ter de truf'—dat pumpkin pie was settin' dar on de winder ledge, abandoned, Jedge. Nobody nowhar nigh hit, Jedge. Hit wuz a case ob 'justifiable adoption,' brought on by de Christmus sperrit."—Case and Comment.

It was the day following Christmas, and Peter Anderson was before the court for being "drunk and disorderly."

"Peter," said Judge Briles, "can't you realize that Christmas time is the last time in the world for riotous conduct? It's a purely religious occasion. Christmas and drink do not go together. Why is it that a man can't enjoy the good things of the holiday period without—"

The accused suddenly interrupted.

"Wait, Jedge—wait," he said, "dey ain't no use ob yo' wastin' all dem fancy words. Crismus didn't hab nuthin' ter do wid me an' mah drinkin.' Hit dates back ter de 'lection not going ter suit me."—Case and Comment.

The Old Timer looked up from his ricky and asked:

"You think that story on Bill Sims is a good one, eh?"

"Good or bad, it's true."

"Well, so is this," said the Old Timer, "and it happened down in Texas by the Rio Grande. I used to live down that way for a while, and in the village which I graced with my presence a certain old horse doctor was elected justice of the peace. What he didn't know about the law was sufficient. He knew nothing; he should have made an ideal justice of the peace.

"His first case, however, was that of a man arrested for stealing a horse.

"'Guilty or not guilty?' asked the justice."

"'Not guilty.' answered the prisoner.

"'Then, what the deuce are you doing here?" demanded the justice of the peace. 'Get out!'—San Francisco Chronicle.

## WEEKLY DIGEST

**Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.**

*Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co. St. Paul, Minn*


**Arkansas**.....30, 37, 47, 55, 94
**Georgia**.....16, 20, 44, 62, 92, 95
**Illinois**.....2, 4, 21, 31, 38, 39, 45, 56, 63, 64, 82, 86, 96.
**Indiana**.....42
**Iowa**.....17, 40, 50, 58, 61, 75, 98
**Kentucky**.....15, 35, 83, 88
**Louisiana**.....71
**Massachusetts**.....84, 91
**Mississippi**.....51, 52, 93
**Missouri**.....5, 34, 90
**Nebraska**.....49, 54
**New York**.....6, 7, 8, 14, 22, 23, 25, 36, 57, 59, 66, 67, 68, 69, 72, 73, 74, 76, 77, 78, 79, 80, 85, 100.
**North Carolina**.....18, 27, 97
**South Carolina**.....65
**South Dakota**.....12, 29
**Tennessee**.....32
**Texas**.....1, 3, 19, 26, 46, 48, 53, 60, 70
**U. S. C. C. App**.....9, 10, 13, 43, 99
**United States D. C**.....11, 24
**West Virginia**.....28, 41, 81, 89
**Wisconsin**.....33, 87


1. **Adverse Possession** — Presumption.—In trespass to try title, where it appeared that plaintiffs asserted right to the land which it was claimed had not been asserted by their ancestors for 50 years, the question of the presumption of the grant by reason of the lapse of time should be submitted to the jury.—House v. Stephens, Tex., 198 S. W. 384.

2.——Sufficiency of Possession.—Where line to which plaintiff claimed was marked by weeds and brush and he cultivated to within a few feet thereof and the adjoining owners only cultivated thereto, plaintiff held to have a sufficient possession to ripen into title.—Bugner v. Chicago Title & Trust Co., Ill., 117 N. E. 711.

3. **Animals**—Damages.—Where defendant was not, in writing, notified to dip his cattle, horses and mules to eradicate fever ticks until after the filing of the complaint and information, he cannot be convicted on account of failure.—McGee v. State, Tex., 198 S. W. 302.

4. **Arbitration and Award**—Attacking Award.—A party to an award who attacks it on the ground that the arbitrators did not furnish a transcript of evidence,' and that each member of the board did not read the testimony before making the award, as required by the agreement, must show that such condition was not complied with.—Clark v. Courter, Ill., 117 N. E. 720.

5. **Attorney and Client**—Contingent Fee.—Plaintiffs' contract being on a 50 per cent basis, where defendant settled with plaintiffs' client without plaintiffs' knowledge, paying client $4,000 and agreeing to pay attorney's fees, plaintiffs are not limited to 50 per cent of the $4,000.—Mytton v. New York, C. & St. L. R. Co., Mo., 198 S. W. 189.

6.——Disbarment.—An attorney, converting his client's money to his own use with full knowledge on his part of the violation of his professional obligation, will be disbarred.—In re Wilkenfeld, N. Y., 167 N. Y. S. 508.

7.——Discharge of Attorney.—Client has right arbitrarily to discharge his attorneys, and if he does so he is liable for services rendered by them only up to time of discharge.—In re Board of Water Supply of City of New York, N. Y., 167 N. Y. S. 531.

8.——Stale Charge.—Where alleged unprofessional conduct occurred seven years ago, and the matter has been before the courts and examined by the bar associations, which failed to find sufficient ground to present charges, a proceeding for discipline will be dismissed.—In re Tuck, N. Y., 167 N. Y. S. 534.

9. **Bankruptcy**—Bidder at Sale.—Unsuccessful bidder at sale of bankrupt's property held without standing to oppose confirmation, because he would have bid more if property had been sold as a whole, instead of separately.—Jacobsohn v. Larkey, U. S. C. C. A., 245 Fed. 538.

10.——Estoppel.—That one creditor of a bankrupt had orally promised another creditor of the same class that its claim should be paid does not estop the former from receiving dividends equally with the latter.—Moise v. Scheibel, U. S. C. C. A., 245 Fed. 546.

11.——Preference.—As respected question of preference, held that transaction whereby claimant advanced $1,000 and took mortgage to secure it and previous loans by his wife, was not changed in legal effect by the indirect manner in which it was carried out.—In re Sutherland Co., U. S. D. C., 245 Fed. 663.

12.——Preference.—Where the bankrupt gave a mortgage less than four months before his adjudication as bankrupt, covering the entire stock of goods in trade and the mortgagee permitted him to sell the goods and treat them as his own without applying the proceeds to the debt, the mortgage was invalid as against creditors.—Pierre Banking & Trust Co. v. Winkler, S. D., 165 N. W. 2.

13.——Stock Subscription.—A creditor of a bankrupt corporation, who was also holder of unpaid stock, held erroneously required to pay his stock subscription in full as a condition to the allowance of his claim.—Moise v. Scheibel, U. S. C. C. A., 245 Fed. 546.

14. **Banks and Banking**—Coupon Holders.—Bank, made depository of railroad funds to pay coupons on two bond issues, held not a trustee for the coupon holders, and receiver of railroad was entitled to the balance of the fund yet unpaid to coupon holders.—Noyes v. First Nat. Bank, N. Y., 167 N. Y. S. 288.

15.——Stockholder.—A bank does not become party to a stockholder's contract of sale of his stock, giving his right to share in doubtful assets collected by it, by its retaining and collecting them.—First Nat. Bank v. Armstrong, Ky., 198 S. W. 226.

16. **Bills and Notes**—Joint and Several Signers.—Where several signed a note reading, "We, or either of us, promise to pay," etc., it is a

promise jointly and severally, and the holder may sue any one of parties without suing the other.—Williams v. First Nat. Bank, Ga., 94 S. E. 73.

17.——Renewal.—If a note is without consideration, a renewal thereof, although extending time of payment, is also without consideration, and evidence bearing on want of consideration of the original note. tending to establish fraud in its inception, is admissible.—City Nat. Bank of Auburn, Ind., v. Mason, Ia., 165 N. W. 103.

18. **Bridges**—Maintenance.—Correct measure of duty of defendant town was maintenance of bridge of sufficient strength to bear up weight of any vehicle that could reasonably be expected in vicinity where it was placed.—T. J. Carter & Co. v. Town of Leakesville, N. C., 94 S. E. 6.

19. **Carriers of Live Stock** — Damage in Transit.—In action by shipper of live stock for damages in transit, it was error to permit him to testify that he met a man who said he was the yardmaster, and who on request refused to give assistance in taking care of cattle, in the absence of proof that such person was in fact the carrier's yardmaster.—Texas & P. Ry. Co. v. Thorp, Tex., 198 S. W. 335.

20. **Carriers of Passengers**—Care of Infant.—On evidence in action for death of plaintiff's infant son, while a trespasser on running board of sight-seeing car, from alleged willful and wanton negligence of driver, held that decedent's failure to exercise due care according to his capacity was for jury.—Madden v. S. L. Mitchell Automobile Co., Ga., 94 S. E. 92.

21. **Commerce**—Employes.—Death of painter struck by interstate train while trying to remove from the track a speeder on which he went after paint, held not covered by the federal Employers' Liability Act, § 1.—Jackson v. Industrial Board of Illinois, Ill., 117 N. E. 705.

22.——Spur Tracks.—Where railroad company, whose tracks were wholly within state, maintained private spur track at expense of owner, over which it hauled freight cars to owner's premises, laborer repairing spur track was not engaged in interstate commerce, notwithstanding railroad sometimes hauled interstate freight over track.—In re Liberti, N. Y., 167 N. Y. S. 478.

23.——Workmen's Compensation Act.—A carpenter, employed in repairing coal chutes through which coal passed to interstate locomotives, was not engaged in interstate commerce, so as to prevent the award of compensation to his minor children, under Workmen's Compensation Law.—Gallagher v. New York Cent. R. Co., N. Y., 167 N. Y. S. 480.

24. **Common Carriers**—Rates.—Contract between telegraph and railway companies for "offline" services at less than published rates, though valid when made prior to Act June 29, 1906, c. 3591, is prohibited thereby.—Chicago, Great Western R. Co. v. Postal Telegraph-Cable Co., U. S. D. C., 245 Fed. 592.

25. **Constitutional Law**—Due Process of Law.—Due process of law requires that the fact of a contract of employment within the Workmen's Compensation Act shall be determined judicially by evidence required to establish any other contractural relation.—Kackel v. Serviss, N. Y., 167 N. Y. S. 348.

26.——Due Process of Law.—In suit against railroad, trial court's holding that stipulation in road's pass which exempted it from liability for injuries resulting from its negligence was void did not contravene due process provisions of federal and state constitutions.—Galveston, H. & S. A. Ry. Co. v. Mullen, Tex., 198 S. W. 409.

27. **Corporations**—By-Laws.—Verbal by-laws limiting the power of a corporation president to exectue a note are binding on a payee, who knows of such by-laws, and where there is evidence of such knowledge, such by-laws can be shown in evidence.—Phillips v. Interstate Land Co., N. C., 94 S. E. 12.

28.——Foreign Corporation.—A foreign private corporation, maintaining no office in West Virginia and transporting its products to market by its own steamboats and barges, along the Ohio River from Pittsburgh to points not in the state, was not doing business in the state, within Code 1913, c. 124, relating to service of process.—Hayman v. Monongahela Consol. Coal & Coke Co., W. Va., 94 S. E. 36.

29.——Instructions.—In action for breach of contract to purchase, in future, from plaintiff stock of insurance company, statement made by company to insurance department as to book value of stock was not conclusive, and exclusion of evidence, as to financial condition of company as going concern was error.—Tuthill v. Sherman, S. D., 165 N. W. 4.

30. **Covenants**—Incumbrance.—An easement in a wall entirely on one lot by the owner of an adjoining lot, who had the joists of his building resting in such wall, was an "incumbrance" on the first lot within Kirby's Dig., § 731.—Kahn v. Cherry, Ark., 198 S. W. 266.

31. **Damages**—Actual.—Where lessee agreed to pay certain rental, and further covenanted to remodel and improve building within six months, expending not less than $5,000, and bond secured performance in penal sum of $5,000, sum of $5,000 was not liquidated damages and lessor on breach could recover only actual damages.—Giesecke v. Cullerton, Ill., 117 N. E. 777.

32.——Mitigating Loss.—Where one enjoined from fencing a roadway finally prevailed and it appeared that he could have moved his fence back pending litigation for $75, he cannot obtain $907 damages on the injunction bond for damages from loss of the use of fields left open.—Johnson v. Brown, Tenn., 198 S. W. 243.

33.——Penalty.—Provision that contractor will pay owner $50 per day for every day work on building remains uncompleted after specified time will be construed as provision for penalty where delay would probably cause much less loss than $50 per day, and damages could probably be easily ascertained.—Grant Marble Co. v. Marshall & Ilsley Bank, Wis., 165 N. W. 14.

34. **Death**—Last Clear Chance.—In an action for death, an allegation that deceased was "in the exercise of ordinary care" does not preclude the benefit of the last chance rule.—Bybee v. Dunham, Mo., 198 S. W. 190.

35. **Dedication**—Recognition. of.—Deeds describing property as running back a specified distance to an alley, thereby excluding an alley 20 feet wide, held either a dedication or a recognition of an abutting owner's right to a passway by necessity.—Nieten v. Kimsey, Ky., 198 S. W. 203.

36. **Divorce**—Decree in Rem.—Divorce decree is decree in rem, binding on all the world in so far as it alters status of spouses, but not binding on persons not parties to action in so far as it affects custody of child of the marriage, though it attempt to fix its custody beyond joint lives of parents.—In re De Saulles, N. Y., 167 N. Y. S. 445.

37. **Easements**—Building.—Where an owner sold and warranted lots in two parts, the joists of a building on the first sold, resting in the wall of a building situated on the other part, was an easement on the second part.—Kahn v. Cherry, Ark., 198 S. W. 266.

38. **Election of Remedies**—Bar.—Where one has rights of action at common law and under a statute for the same injury, the bringing of either of such suits is not a bar to the other, particularly where no recovery has been had. —Jackson v. Industrial Board of Illinois, Ill., 117 N. E. 705.

39. **Eminent Domain**—Agreement on Compensation.—Under Eminent Domain Act, authorizing condemnation when parties cannot agree upon compensation, a landowner must know identity of prospective purchaser and proof of inability to agree with a railroad's agent, who did not disclose his principal's identity, is insufficient.—Pittsburgh, C., C. & St. L. Ry. Co. v. Gage, Ill., 117 N. E. 726.

40. **Exchange of Property**—Laches.—Delay in investigating Michigan land for nearly a year by seller of land in Iowa, who took Michigan land in part payment, with knowledge buyers were expending money in improving Iowa land, held not such laches as to bar seller's action to recover for buyers' misrepresentation of value of Michigan land.—Bronson v. Lynch, Ia., 165 N. W. 35.

41. **Executors and Administrators**—Equity.—Equity has jurisdiction of bill for distribution of funds in hands of administrator of a decedent, brought by executor and distributees of a testatrix against him and others claiming as heirs of testatrix, alleging that testatrix was sole heir of funds, etc., and administrator's refusal to turn them over because of adverse claims.—Lynch v. Armstrong, W. Va., 94 S. E. 24.

42. **Frauds, Statute of**—Renewal of Lease.—Where a lease for five years gives a privilege of renewal for five years, an election in writing to be bound for the additional term satisfies the statute of frauds.—Thurston v. F. W. Woolworth Co., Ind., 117 N. E. 686.

43. **Fraudulent Conveyances**—Voluntary Conveyance.—Voluntary conveyance by man to his wife's brother, for the benefit of his wife and daughter, at a time when he was solvent, not contemplating any hazardous business, and without intent to defraud creditors, held not fraudulent.—Chatham & Phoenix Nat. Bank v. Lovegrove, U. S. C. C. A., 245 Fed. 553.

44. **Garnishment**—Lawful Service. — After judgment against three parties jointly and severally liable on note, affidavit of illegality in garnishment proceeding was properly dismissed, where two who had signed as sureties for the third were legally served, though third was not legally served in original suit.—Williams v. First Nat. Bank, Ga., 94 S. E. 73.

45. **Habeas Corpus**—Jurisdiction.—If it appears from petition and return in habeas corpus proceeding that court which rendered judgment under which prisoner is held, had jurisdiction of person and subject-matter, court to which habeas corpus petition is addressed has no jurisdiction to discharge, and judgment discharging from further imprisonment is void.—People v. Green, Ill., 117 N. E. 764.

46. **Highways** — Registering Automobile. — Failure of automobile driver to register car and place number thereon, held not to make him liable for damages in collision; there being no causal relation between such failure and the collision.—Mumme v. Sutherland, Tex., 198 S. W. 395.

47. **Homestead**—Joinder of Wife.—Where in a deed of trust a husband alone is described as "parties of the first part" and the granting includes "all our right or claim to homestead" and "B., wife of * * * do relinquish * * * all her right of dower," it is not valid under Kirby's Dig., § 3901, relating to homesteads, although signed by the wife and although her acknowledgment contains a release of both homestead and dower rights.—Shurn v. Wilkinson, Ark., 198 S. W. 279.

48. **Husband and Wife**—Community Property. —Where a husband abandoned his wife and she and children of the marriage are in necessitous circumstances, she may, without the husband's joinder or consent, convey community property passing good title.—Hadnot v. Hicks, Tex., 198 S. W. 359.

49.——Eminent Domain.—Husband, notwithstanding wife's interest in his realty, may in his own right recover damages from its taking under right of eminent domain.—McCullough v. St. Edward Electric Co., Neb., 165 N. W. 157.

50. **Insurance**—Burglary.—A burglary policy for loss by "persons who shall have made entry into safes by use of tools or explosives directly thereup," does not cover a burglary where the building is broken into, the safe opened by working the combination, and the inner wooden drawers, containing the money, broken open.—Blank v. National Surety Co., Ia., 165 N. W. 46.

51.——By-Laws.—Where benefit certificate so provided, insurer held bound by by-law subsequently adopted requiring x-ray photograph as part of proof of disability.—Eminent Household of Columbian Woodmen v. Wicker, Miss., 76 So. 634.

52.——Indemnity Policy.—Under an indemnity policy providing for an increased amount if insurer did not take advantage of offer of compromise made by injured employe or his duly authorized representative, widow could not make offer binding the insurer to the increased amount.—Georgia Life Ins. Co. v. Mississippi Cent. R. Co., Miss., 76 So. 646.

53.——Insurable Interest.—Anyone deriving benefit from existence of property or who would suffer from its loss has an "insurable interest," though having only an equitable title or other qualified property.—Rolater v. Rolater, Tex., 198 S. W. 391.

54.——Permanent Loss.—Color blindness, so impairing sight that member of brotherhood of railroad trainmen carrying disability insurance was unable to continue in train service and was discharged, held a complete and permanent

loss of sight of both eyes within insurance certificate.—Routt v. Brotherhood of Railroad Trainmen, Neb., 165 N. W. 141.

55.——Violation of Law.—Under a policy of insurance denying recovery, where death was caused by violation of law, recovery could be had for death of one who was the aggressor in a pistol fight, but who had retired from the conflict at the time of a shot from a bystander causing his death.—Eminent Household of Columbian Woodmen v. Howle, Ark., 198 S. W. 286.

56. **Interest**—Partnership Accounting. — A written contract of partnership in an accounting where there are losses, and one partner is found indebted to another for advance, is not an "instrument in writing," within the meaning of the statute on interest, such as to entitle the party making advances to interest.—Mariner v. Gilchrist, Ill., 117 N. E. 695.

57. **Landlord and Tenant**—Estoppel.—Where demised premises were regularly flooded by overflow of sewer in severe storms, and lessee remained in possession for over 10 months, during which time premises were often flooded, lessor cannot be held liable for injuries to tenant's property on account of such flooding.—Baitzel v. Rhinelander, N. Y., 167 N. Y. S. 343.

58.——Property Leased.—Term "theater supplies" in lease, as understood in film business, includes those minor incidentals necessary to conduct of business which are kept by film exchange for accommodation of trade.—McCullough Realty Co. v. Laemmle Film Service, Ia., 165 N. W. 33.

59. **Libel and Slander**—Libel per se.—To falsely publish of one in reference to her capacity as teacher that she is incompetent is libelous per se.—Cafferty v. Southern Tier Pub. Co., N. Y., 167 N. Y. S. 413.

60.——Mitigation.—Excitement at time of making a slanderous remark as to chastity of female is admissible as bearing upon issue of intent, but not as a defense, unless it amounted to temporary insanity.—Pickerell v. State, Tex., 198 S. W. 303.

61.——Privileged Communication.—An attorney correspondent of a credit company, in the absence of malice or bad faith, did not exceed his legal rights in sending a substantially correct itemized statement obtained direct from plaintiff, to his principal, adding thereto that some action should be taken, by all creditors, although he solicited the claims against plaintiff.—Simons v. Petersberger, Ia., 165 N. W. 91.

62. **Livery Stable and Garage Keepers**—Memechanic asserting lien for repairs cannot rechanics' Lien.—Owner of motor car held by cover possession where, admitting that he authorized part of work, and that he had not paid or offered to pay therefor and thus discharge lien, though he disputed total of amount claimed.—Knauff v. Yarbray, Ga., 94 S. E. 75.

63. **Malicious Prosecution**—Advice of Counsel.—Where prosecutor set forth in complaints all facts and judges to whom they were presented deemed them sufficient, held prosecutor was not liable for malicious prosecution, same rule applying as where one acts on advice of counsel.—Glenn v. Lawrence, Ill., 117 N. E. 757.

64. **Mandamus**—Remedy.—Where plans of a proposed milk depot were not in compliance with the ordinances, and a permit was refused, the builder should have submitted proper plans before applying for mandamus to compel the issuance of a permit.—People v. City of Chicago, Ill., 117 N. E. 779.

65. **Master and Servant**—Contract.—Where employer deducted $1 from wages each month, for which he was to furnish a staff of doctors to render medical attention to the employes' families when requested, there was a contract based upon a valuable consideration.—Owens v. Atlantic Coast Lumber Corp., S. C., 94 S. E. 15.

66.——Contract of Employment. — Where plaintiff's decedent, a resident of New Jersey, was killed in the employ of a New Jersey corporation, the contract having been made in New Jersey, the New Jersey Compensation Law governs, although the accident happened in the state of New York.—Barnhart v. American Concrete Steel Co., N. Y., 167 N. Y. S. 475.

67.——Course of Employment.—Under Workmen's Compensation Act, § 3, subd. 4, as amended by Laws 1916, c. 622, employe of contractor doing work in garage and killed during noon hour while in boiler room held not killed by an accident arising out of and in the course of his employment.—Manor v. Pennington, N. Y., 167 N. Y. S. 424.

68.——Course of Employment.—Under Workmen's Compensation Law, § 2, group 22, and § 3, subd. 4, as amended by Laws 1916, c. 622, § 2, apartment house janitor, injured by falling while cleaning window, held entitled to compensation.—Zubradt v. Shepard's Estate, N. Y., 167 N. Y. S. 306.

69.——Course of Employment.—In proceeding under Workmen's Compensation Law, held injuries sustained by city employe, supervising construction of subway, while taking bath preparatory to going to office to make up estimates, arose out of and in course of employment.—Sexton v. Public Service Commission of City of New York, N. Y., 1667 N. Y. S. 493.

70.——Discharge from Employment.—When employer assigns grounds for discharge of employe, he cannot afterwards justify it on other grounds which were not at the time made basis of termination of contract.—Levy v. Jarrett, Tex., 198 S. W. 333.

71.——Employer's Liability.—Employer's payment of wages of injured employe, its insurance policy taken out with reference to Burke-Roberts Employers' Liability Act, its receipts for wages taken by it under Louisiana Workmen's Compensation Act, and its reimbursement from insurer, held to eliminate question whether employe was entitled to compensation under act.—Summers v. Woodward, Wight & Co., La., 76 So. 674.

72.——Hazardous Employment.—As to claimant, employed by Public Service Commission to supervise construction of subway, held, city was engaged in hazardous employment, within Workmen's Compensation Law, § 2, group 13, as amended by Laws 1916, c. 622, and was liable for injuries in view of group 43.—Sexton v. Public Service Commission of City of New York, N. Y., 167 N. Y. S. 493.

73.——Interstate Commerce.—A plumber, employed in the maintenance of ways department of an interstate carrier, who was repairing pipes in a station, and was killed by a train while crossing tracks in the course of his employment, was entitled to no compensation, since he was engaed in interstate commerce.—Vollmers v. New York Cent. R. Co., N. Y., 167 N. Y. S. 426.

74.——Limitation of Action.—One injured January 10, 1916, who filed claim January 10, 1917, filed same within one year required by Workmen's Compensation Law, § 28.—Hudspith v. Pierce-Arrow Motor Car Co., N. Y., 167 N. Y. S. 418.

75.——Res Ipsa Loquitur.—Doctrine of res ipsa loquitur held not to apply to sudden jerking, to unusual degree, of freight train, when about to stop for water, throwing conductor.—Hunt v. Chicago, B. & Q. R. Co., Ia., 165 N. W. 105.

76.——Respondeat Superior.—Owner of automobile, leaving it with garage keeper either as prospective buyer or sales agent, held not liable

for his negligence while driving it for demonstration.—Emery v. McCombs, N. Y., 167 N. Y. S. 474.

77.——Respondeat Superior.—A gas company, loaning its automobile to its employes to attend a picnic, held not liable for an injury sustained by plaintiff being struck by such automobile after the driver had taken the employes to their homes.—Stenzler v. Standard Gaslight Co., New York City, N. Y., 167 N. Y. S. 282.

78.——Statutory Construction.—Claim of person employed under New York contract, injured away from his employer's plant in New Jersey, held covered by the New York statute.—Gilbert v. Des Lauriers Column Mould Co., N. Y., 167 N. Y. S. 274.

79.——Workmen's Compensation Act.—Oral notice to assistant foreman of injury is not sufficient under Workmen's Compensation Law on which to base finding of no prejudice for failure to give written notice, where such assistant did not notify the employer, although it was his duty to do so.—In re Dorb, N. Y., 167 N. Y. S. 415.

80.——Workmen's Compensation Act.—A retail coal dealer held not engaged in the business of storage within Workmen's Compensation Law, § 2, group 29, so that the dependent of an employe injured while loading coal was not entitled to compensation thereunder.—In re Roberto, N. Y., 167 N. Y. S. 397.

81. **Municipal Corporations** — Nuisance. — Though curb boxes, when in proper repair and located outside of sidewalk, are not nuisances per se, they may become so because of their defective condition and situation therein.—Corbin v. City of Huntington, W. Va., 94 S. E. 38.

82.——Nuisance.—A city does not have the power to declare in advance that a proposed milk depot at which horses shall be stabled is a nuisance or to forbid the erection of the necessary buildings.—People v. City of Chicago, Ill., 117 N. E. 779.

83.——Ordinance.—City ordinance, prohibiting operation of stockyards and certain other business without a permit, but which does not prescribe any conditions with which an applicant must comply, or which govern the board, is arbitrary and invalid.—City of Richmond v. House, Ky., 198 S. W. 218.

84.——Proximate Cause.—Negligence of servant driving defendant's automobile in not stopping after blowout in time to have prevented release of locking rings from wheel, one of which struck pedestrian, was proximate cause of injury, though precise form in which negligence would probably cause harm could not have been foreseen.—Regan v. Cummings, Mass., 117 N. E. 800.

85.——Repair of Streets.—Paving contract to maintain pavement for period of 10 years, and to make all repairs that may become necessary through ordinary wear, or from natural causes, etc., did not require contractor to repair defects caused, or possibly caused, by tearing up or tunneling by other contractors to put in pipes.—City of Troy v. Fidelity & Deposit Co. of Maryland, N. Y., 167 N. Y. S. 338.

86.——Vacating Alley.—In an action involving an alley, in which it was stipulated that at the time of an attempted vacation the city had six aldermen, the vacation will be held void where it appeared only four aldermen voted for the vacation, under the statute requiring a three-fourths majority.—Rollo v. Pool, Ill., 117 N. E. 756.

87. **Negligence**—Notice of Defect.—Whether owner of building had notice of defective condition of step in vestibule was immaterial on question of owner's liability to member of public injured thereby.—Hommel v. Badger State Inv. Co., Wis., 165 N. W. 20.

88. **Nuisance**—Odors and Noise.—Although stockyards may become nuisance, being in partial residence district within 20 feet of church, injunction will not lie to prevent it, where it is not shown that noise or odor has caused any discomfort or ill effects, and apprehended injury is doubtful.—City of Richmond v. House, Ky., 198 S. W. 218.

89. **Partnership**—Accounting.—In suit by one partner against another for half of cost of partnership equipment furnished by plaintiff under agreement for reimbursement, decree allowing such recovery before ascertainment of firm's liability and final settlement of its accounts was error.—Jones v. Rose, W. Va., 94 S. E. 41.

90. **Principal and Agent**—Breach of Contract. —Defendant's failure to pay plaintiff's wages and expenses in soliciting oil leases, whereby she ran out of funds and had to return to her home, held a sufficient breach to justify plaintiff in refusing to further perform.—Hughes v. Bilby, Mo., 198 S. W. 179.

91.——Architect.—It was not within authority of architect employed by owner of building under construction to waive provision of contract that, if any extra work was required, a price for same must be agreed upon and approved in writing by architect before such work was begun.—Burns v. Thorndike, Mass., 117 N. E. 799.

92. **Sales**—Failure of Consideration.—Where a purchaser, notwithstanding his full, actual knowledge of defects in articles sold to him, deliberately promises in writing to pay therefor, he cannot thereafter set up a plea of failure of consideration based upon such defects.—Shores-Mueller Co. v. Bell, Ga., 94 S. E. 83.

93. **Trover and Conversion**—Bond in Replevin. —Where carrier, with whom sheriff left replevined property, turned it over to plaintiff, in replevin, and defendant, having given bond, thereupon sued in trover, tendering the issue of title, which was resolved against him, the defendant in trover was not liable, since the bond given by defendant in replevin did not confer title, but at most mere right of temporary possession. —Abasi Bros. v. Louisville & N. R. Co., Miss., 76 So. 665.

94.——Damages.—Where, after his title was quieted against claim of plaintiff, defendant, without objection, took from plaintiff's possession crops received by her as rent from land, defendant was not guilty of conversion of such crops, for, being entitled to the land, he was entitled to the rents.—West v. West, Ark., 198 S. W. 282.

95.——True Owner.—Railroad receiving goods for carriage from one whose possession is apparently rightful will not be liable as for conversion in action by true owner, unless latter, before goods are delivered demands them or gives notice of its rights thereto, and his intention to enforce it.—Atlantic Coast Line R. Co. v. Nellwood Lumber Co., Ga., 94 S. E. 86.

96. **Warehousemen**—Burden of Proof.—Where a safety deposit company leased a box to plaintiff, who deposited therein money, and it was lost without her opening the box, the presumption arises that the loss was due to the company's negligence, and it has the burden of showing that it exercised due care.—Schaefer v. Washington Safety Deposit Co., Ill., 117 N. E. 781.

97. **Wills**—Construction.—Where testator devises part of his estate to his wife during widowhood, with remainder to his "living children," directs balance of his estate to be divided among his "living children," children living at his death, but predeceasing his wife, are included in class, and expiration of wife's interest merely fixes time for distribution.—Taylor v. Taylor, N. C., 94 S. E. 7.

98.——Mutual Wills.—Joint or mutual wills for benefit of survivor constitute a single will, and upon death of the first of the parties the will has no further existence as will of survivor in absence of gifts to third persons.—Anderson v. Anderson, Ia., 164 N. W. 1042.

99.——Residuary Estate.—Where a residuary estate is devised to the executor in trust, but the testator fails to designate the beneficiaries of the trust, it will be treated as intestate property, and disposed of as if no will had been made.—Thomas v. Anderson, U. S. C. C. A., 245 Fed. 642.

100. **Work and Labor**—Substantial Performance.—Where a contractor, who agreed to build an iron stairway, substantially completed it, but failed to prove either the importance of the omission or the expense of supplying it, he could not have verdict for the full contract price.—Gens v. Tuscany Realty Co., N. Y., 166 N. Y. S. 1076.